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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 Hon. Warren R. Darrow Division PTB **DEFENDANT JAMES ARTHUR RAY'S MOTION TO STRIKE AGGRAVATING CIRCUMSTANCES**

Defendant James Arthur Ray, by and through his attorneys of record, hereby moves this Court for an order striking the State's allegations of aggravating circumstances. This motion is based on the attached Memorandum of Points and Authorities, the files and records in this case, and any argument and evidence adduced at the hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On June 22, 2011, the jury acquitted Mr. Ray of reckless manslaughter and convicted him of the lesser-included offenses of negligent homicide—an unintentional crime as a matter of law. Notwithstanding the undisputed fact that the tragic deaths in this case were unintentional, the State is proceeding with five aggravating circumstances, seeking to increase the sentence for these probation-eligible offenses for a probation-eligible defendant to an aggravated and aggregate prison term of 11.25 years. Specifically, the State alleges that Mr. Ray committed negligent homicide (1) in an "especially heinous, cruel or depraved manner," (2) for pecuniary gain, (3) with an accomplice, (4) while in a "unique position of trust" with the decedents, and (5) causing "physical, emotional or financial harm" to the decedents' immediate families. *See* State's Allegation of Aggravating Circumstances, filed 2/16/10. The State's first four allegations are inappropriate and unlawful and threaten to introduce fundamental error into the sentencing process. *See, e.g., State v. Alvarez*, 205 Ariz. 110, 113, 115–16 (App. 2003) (a sentence based on an improper aggravating factor is fundamental error). The Court should strike circumstances (1) through (4) as unsupported by any evidence or Arizona law.

The State's request for unsupported aggravators is an egregious example of the prosecution's attempt to stretch the criminal law in every aspect of Mr. Ray's case. In particular, the State's allegation that Mr. Ray acted (1) in an "especially heinous, cruel, or depraved manner" is unprecedented in the context of the *unintentional, nonviolent* crime of negligent homicide. So too is the allegation that Mr. Ray committed the crime (2) for financial gain, which is limited to *intentional* crimes in which the defendant was motivated to profit *from the deaths*. And the allegation that Mr. Ray (3) committed these unintentional offenses with an accomplice is also unsupported by the evidence in this case. Not only has the State failed to name the alleged accomplices, but there is no allegation that any other actor possessed an *intent* to further the criminal conduct, as Arizona law requires.

The State's novel allegation that Mr. Ray's sentence should be aggravated because he (4) was in a "unique position of trust" with the decedents presents distinct problems. Because the

allegation arises under the statute's "patently vague" "catch-all" provision, the Due Process Clause prohibits this Court from relying on it as the basis of an aggravated sentence; the Court can consider a catch-all factor *only* if the jury finds other aggravators sufficient to support an increased sentence. *See generally State v. Perrin*, 222 Ariz. 375, 378 (App. 2009) (sentence violates Due Process if catch-all provision is one of the two aggravating circumstances relied upon to impose an aggravated sentence). As explained below, there is thus no basis for trying this circumstance to the jury over Mr. Ray's objection. In addition, to the extent this aggravator has ever been recognized under Arizona law, it has never been applied outside the context of sexual abuse, and—like the comparable Federal Sentencing Guideline—requires that the defendant *abuse* a position of trust in a way that *facilitates* the crime or the cover-up.

Mr. Ray is a 53-year old man who has no criminal history and has been convicted of an offense that is unintentional as a matter of law and non-violent as a matter of fact. The State has no legitimate interest in exposing him, or any criminal defendant, to an aggravated sentence that is not legally supported. To do so would be fundamental error. *See, e.g., Alvarez*, 205 Ariz. at 113. This Court should avoid such error by striking the four illegitimate aggravating factors at this time.

II. ARGUMENT

A. Allegation (1): Mr. Ray Committed The Unintentional Crime of Negligent Homicide In An "Especially Heinous, Cruel or Depraved Manner."

The aggravating factor pertaining to "especially heinous, cruel, or depraved manner," A.R.S. §13-701(D)(5), requires conduct that is not only intentional, but also worlds away from the circumstances of this case. A brief overview of cases in which this aggravating circumstance has applied, and of the approved jury instructions that accompany the aggravator, make clear that it has no application in Mr. Ray's case.[1]

[1] The Arizona Supreme Court has expressly approved the following language as a jury instruction regarding this aggravating circumstance:

"In order to find heinousness or depravity, you must find beyond a reasonable doubt that the defendant exhibited such a mental state at the time of the offense by doing at least one of the following acts:

One, relishing the murder. In order to relish a murder the defendant must show by his words or actions that he savored the murder. These words or actions must show debasement or

1. Heinousness and depravity

"Heinousness and depravity focus on 'a killer's vile state of mind at the time of the murder, as evidenced by the killer's actions.'" *State v. Hyde*, 186 Ariz. 252, 280 (quoting *State v. Gretzler*, 135 Ariz. 42, 51 (1983)). "The factors used to establish a heinous and depraved state of mind are (1) relishing the killing, (2) commission of gratuitous violence, (3) mutilation of the victim, (4) senselessness of the killing, and (5) helplessness of the victim." *State v. Carlson*, 202 Ariz. 570, 583-84 (2002). "To satisfy constitutional concerns," Arizona courts "*narrowly construe* these terms to apply only to 'killing[s] wherein additional circumstances of the nature enumerated above set the crime apart from the usual or the norm.'" *Id.* at 581 (emphasis added). In analyzing the five factors, two principles are critical. First, the aggravator requires that the State prove that Mr. Ray *intended* to cause harm in order to have acted in an especially heinous or depraved manner. The unintentional crime of negligent homicide does not suffice. This alone is dispositive of the State's attempt. Second, the last two factors— senselessness and helplessness—are legally insufficient by themselves to permit a rational juror to find special heinousness or depravity. *E.g.*, *State v. Schackart,* 190 Ariz. 238, 250, 947 P.2d 315, 327 (1997) ("Senselessness and helplessness, without more, are ordinarily insufficient to prove heinousness or depravity."); *see also State v. Hampton*, 213 Ariz. 167, 184 (2006) (approving jury

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perversion, and not merely that the defendant has a vile state of mind or callous attitude. Statements suggesting indifference, as well as those reflecting the calculated plan to kill, satisfaction over the apparent success of the plan, extreme callousness, lack of remorse, or bragging after the murder are not enough unless there is evidence that the defendant actually relished the act of murder at or near the time of the killing.

Two, inflicted gratuitous violence on the victim clearly beyond that necessary to kill.

Three, needlessly mutilated the victim's body. In order to find this factor, it must be proven beyond a reasonable doubt that the defendant had a separate purpose beyond murder to mutilate the corpse.

The term "cruel" focuses on the victim's state of mind. Cruelty refers to the pain and suffering the victim experiences before death. A murder is especially cruel when there has been the infliction of pain and suffering in an especially wanton and insensitive or vindictive manner. The defendant must know or should have known that the victim would suffer. A finding of cruelty requires conclusive evidence that the victim was conscious during the infliction of the violence and experienced significant uncertainty as to his or her ultimate fate. The passage of time is not determinative."

State v. Anderson, 210 Ariz. 327, 353 (Ariz. 2005).

instructions which stated that "[b]ecause most murders are senseless and most victims are helpless, a finding of either or both will not alone support a finding the murder was committed in a heinous and depraved manner.").

None of these factors could possibly be found to apply in this case. As this Court and the State know well, there is absolutely no evidence of gratuitous violence (let alone ***any*** violence), of mutilation, or that Mr. Ray "relished" the deaths of the sweat lodge participants. These factors are simply foreign to the trial in which the Court and counsel have participated over the last four months. The evidence in this case also cannot support a finding of senselessness or helplessness. A crime is senseless when it is "unnecessary to the defendant's criminal purpose." *Cañez*, 202 Ariz. at 162. Senselessness does not exist here as a matter of law: Since Mr. Ray is charged with unintentional crimes, he had no "criminal purpose." Similarly, there is no evidence in support of helplessness, for every person who participated in the sweat lodge was a competent adult who testified that they chose to participate, knew they were free to leave, and entered or stayed in the sweat lodge by personal choice. In any event, helplessness alone is legally insufficient to aggravate a first-degree murder charge, much less a negligent homicide charge.

While no one disputes the tragedy of this case, the facts of this case are legally incomparable to those (all involving intentional crimes) in which the especially heinous or especially depraved aggravators have been found to exist:

- The defendant beat the victim "nearly to death with an aluminum baseball bat," then "cut off [the victim's] finger to recover the ring [the victim] was wearing," and laughed and bragged about cutting off the finger. *State v. Bearup*, 221 Ariz. 163, 173 (2009).[2]

- The defendant sexually assaulted the victim, dragged her into a ditch while she was still alive, covered her up with a piece of carpeting, and ran off. *State v. Newell*, 212 Ariz. 389, 396 (2006).

[2] This example, as well as most of the other examples discussed herein, illustrates the application of the aggravating circumstances enumerated in the capital sentencing statute (A.R.S. § 13-751, formerly § 13-703) rather than the noncapital statute (§ 13-701, formerly § 13-702). The lists of aggravating circumstances in sections 13-751 and 13-701 are nearly identical, however, and courts recognize that interpretations of particular aggravators in the capital context apply equally in the noncapital context. *See, e.g., State v. Stanhope*, 139 Ariz. 88, 94-95 (App. 1984) (relying on capital cases interpreting "cruel" and "depraved" sentencing aggravators to interpret those same terms in a noncapital case).

- The defendant committed a murder for the purpose of "witness elimination" — to prevent the victim from testifying about some other crime. *State v. Speer*, 221 Ariz. 449, 464 (2009).

Perhaps even more illustrative are some of the gruesome circumstances in which the Arizona Supreme Court has held that special heinousness and depravity do ***not*** exist:

- Both victims "were subjected to prolonged and varied attacks before they succumbed." One victim "had his throat slashed, a knife pounded into his ear, and his head beaten with a rock." The other victim "was shot through the jaw, hit over the head with a rifle butt and a lantern, and then killed by blows to the head from a cinder block." These attacks were "reprehensible," but did not meet the standard for "gratuitous violence." *State v. Anderson*, 210 Ariz. 327, 355 (Ariz. 2005).

- The defendant "attempted to strangle [the victim], stabbed him six times, and delivered 21 blunt force injuries, ten of them to the head," attacking the victim "with his fist, a frying pan, a laundry bag, and a knife." *Cañez*, 202 Ariz. at 161.

- The defendant shot the victim four times, but there was no evidence of any lapse of time between the gunshots. *State v. Lee*, 189 Ariz. 590, 605 (1997).

- The defendant drove his car over the victim twice while the victim was unconscious. *State v. Richmond*, 180 Ariz. 573, 579 (1994), *abrogated in part on other grounds by State v. Mata*, 185 Ariz. 319, 323 (1996).

These shameless exhibitions of violence did not present circumstances that warranted an aggravated sentence for special heinousness or depravity. With even greater reason, the present case—involving *no* intent to cause harm and *no* display of violence whatsoever—cannot present heinousness or depravity either.

2. Cruelty

Unlike special heinousness and depravity, special cruelty focuses on the victim's physical and mental suffering, if any. *Carlson*, 202 Ariz. at 581. For this aggravating factor to apply, the jury must find that (1) "'the victim consciously experienced physical or mental pain prior to death,'" and (2) "'Defendant knew or should have known that suffering would occur.'" *Id.* (quoting *State v. Trostle*, 191 Ariz. 4, 18 (1997)).

The Arizona Supreme Court has found special cruelty in circumstances such as the following:

- The defendant kept the victim "tied up in a crouched position on his bed. A single stand of heavy parcel post twine extended up [the victim's] back in a V-pattern from his ankles to around his neck. It was configured in such a way as to choke [the victim] if his legs were straightened. He was confined in this manner for a sustained period." *State v. Gretzler*, 135 Ariz. 42, 53, (1983).

- The defendant "forced [his victims] at gunpoint to lie down in the work area of the[ir] restaurant, ordered [them] to remove everything from their pockets, ordered [them] to march through the cooler into the back freezer with their hands interlaced on top of their heads, forced [them] to kneel down, and then shot [them] in rapid succession." *State v. Boggs*, 218 Ariz. 325, 341 (2008). After the defendant "left the victims in the freezer, he heard screaming, at which point he returned to the freezer and shot some more." *Id.*

- The defendant broke into his victim's apartment, then assaulted her, then raped her, and then strangled her to death with a cord. The victim "probably died one to five minutes after the strangulation began." *State v. McCray*, 218 Ariz. 252, 259 (2008).

- The defendant "set fire to the room in which his two infant daughters were asleep and caused them to be burnt to death." *State v. Lujan*, 124 Ariz. 365, 372 (1979) (discussing the facts of *State v. Knapp*, 114 Ariz. 531, 543 (1977)).

- After the defendant stabbed his husband-and-wife victims, they watched each other suffer before they died. *State v. Runningeagle*, 176 Ariz. 59, 65 (1993).

In contrast, such conduct as shooting someone in the head at point-blank range is legally insufficient to support a finding of special cruelty. *State v. Soto-Fong*, 187 Ariz. 186, 202 (1996).

The common thread among all of the cases in which special cruelty exists is that the defendant acted both intentionally and violently. These two factors are consistent with the Arizona Supreme Court's descriptions of what it means for a crime to be especially cruel. In *Lujan*, the court stated that "[f]or a killing to be especially cruel, the perpetrator must senselessly or *sadistically inflict* great pain on his victim." 124 Ariz. at 372 (emphasis added). In *State v. Van Adams*, 194 Ariz. 408 (1999), the court stated that a finding of special cruelty "requires conclusive evidence that the victim was conscious during the *infliction of violence*." *Id.* at 420 (emphasis added). And in *State v. Anderson*, 210 Ariz. 327 (2005), the court approved of a trial court's jury instruction providing that "[a] murder is especially cruel when there has been the

infliction of pain and suffering in an especially *wanton and insensitive or vindictive manner*" and that "[a] finding of cruelty requires conclusive evidence that the victim was *conscious* during the *infliction of the violence*." *Id.* at 352 n.19 (emphases added).

It is undisputed that Mr. Ray did not act wantonly, vindictively, or otherwise in a manner that evidenced an intent to cause harm; he did not "inflict" anything on anyone. It is equally undisputed that no violence occurred during the sweat lodge incident. Without both intent to cause harm and violent acts, there can be no special cruelty. The State's allegation should be stricken.

B. Allegation (2): Mr. Ray Committed The Unintentional Offense Of Negligent Homicide For Pecuniary Gain.

The State contends that Mr. Ray committed negligent homicide "as consideration for the receipt, or in the expectation of the receipt," of something having "pecuniary value." A.R.S. §13-701(D)(6). In other words, the State alleges that Mr. Ray committed the unintentional crime of negligent homicide for pecuniary gain. This allegation grossly distorts settled law regarding the meaning of this aggravating circumstance and flies in the face of logic. It must be stricken.

1. The §13-701(D)(5) aggravator requires intentional conduct motivated by pecuniary gain.

The pecuniary gain aggravator "is satisfied *only* 'if the expectation of pecuniary gain is a *motive, cause, or impetus* for the [crime]." *State v. Armstrong*, 208 Ariz. 360, 363 (2004) (quoting *State v. Hyde*, 186 Ariz. 252, 280 (1996)) (emphasis added). In other words, "a finding that pecuniary gain served as a motive is *essential* to establishing the [pecuniary gain] factor. *State v. Sansing*, 200 Ariz. 347, 354 (2001) (emphasis added), vacated on other grounds, 536 U.S. 954 (2002). "The existence of an economic motive at some point during the events surrounding a murder is not enough to establish" pecuniary gain as a motive. *Id.* at 353–54 (quoting *State v. Medina,* 193 Ariz. 504, 513¶ 32, 975 P.2d 94, 103 ¶ 32 (1999)). Instead, "[t]here must be a connection between the motive and the killing," *id.*, and "[t]he State must show [the] connection" through "direct" evidence" or "strong circumstantial evidence." *State v. Ellison*, 213 Ariz. 116, 143 (2006). In light of these rules, ***no Arizona decision*** has ever applied

the aggravator to an unintentional crime such as negligent homicide. Application of this factor to Mr. Ray's case would be unprecedented and unlawful.

The facts of true pecuniary-gain cases illustrate the inapplicability of the aggravator in Mr. Ray's case. Pecuniary gain cases involve fact patterns in which the defendant engaged in intentional killing or robbery in order to take or retain valuable property—for example:

- Killing a mother-in-law "precisely so [the defendant] could benefit from [the mother-in-law's] trust fund and annuities." *Carlson*, 202 Ariz. at 580.
- Killing a convenience store clerk to access the cash register. *State v. Smith*, 146 Ariz. 491, 501 (1985) ("Under the facts of this case (but certainly not of all robberies) the commission of the killing necessarily carried with it the expectation of pecuniary gain.").
- Stealing jewelry and other items from the victims' home, and then killing the victims so that the defendant could escape and avoid identification. *Ellison*, 213 Ariz. at 143.
- Forcing victims to lie down during a robbery, and then shooting each of them before leaving the bar "with the intent that no witnesses be left to identify the robbers." *State v. Hensley*, 142 Ariz. 598 (1984) ("The murders were not unexpected or accidental.").
- Killing his victims and then taking "their credit cards, blank checks, an expensive camera, and their automobile." *Gretzler*, 135 Ariz. at 50.
- Killing a victim "to steal and keep his credit and bank cards to make fraudulent purchases and withdrawals," with the admitted objective "to steal money and identification." *State v. Ross*, 180 Ariz. 598, 605 (1994).
- Killing a victim during a home-invasion robbery motivated by the defendant's desire to steal money so that he could buy drugs. *Cañez*, 202 Ariz. at 159.
- Robbing victims and then killing them, where "[t]he only motivation for the killings" was "to leave no witnesses to the robbery." *State v. Correll*, 148 Ariz. 468, 479 (1986).

There is simply no parallel here. The State plainly cannot prove that Mr. Ray's "motive" or cause in committing negligent homicide was to gain financially. The sweat lodge deaths were accidental. Mr. Ray did not profit from them or intend to do so. Unlike the defendants in the *Gretzler*, *Ross*, and *Cañez* cases described above, Mr. Ray did not act in the course of a robbery or any other conduct during which attacking or killing someone made it easier for him to take

money or property. And unlike the defendants in *Ellison*, *Hensley*, and *Correll*, Mr. Ray did not engage in "witness elimination" or any other tactic calculated to improve his chances of escaping the scene with already-taken money or property. The State's assertion of this aggravator lacks a good-faith basis in law.

2. A business's general profit motive is insufficient as a matter of law to satisfy the pecuniary gain aggravator.

Notwithstanding the great weight of authority and the sheer novelty of its position, the State may argue that the pecuniary-gain aggravator is appropriate because the deaths in this case occurred during the course of JRI's business, from which Mr. Ray stood to profit in a general sense. The State may also assert, as it has in the past, that part of JRI's business was to "attract participants who were willing to pay the high cost for attending his events" by seeking to "push the envelope" by "offering events where participants faced extreme physical challenges," including through "activities with high risks of injury and/or physical distress" in which JRI "failed to provide for safeguards to both prevent and address injuries and/or physical distress." State's Response to MIL No. 2, filed 8/2/10, at 4. These assertions are not only factually unsupported, but are insufficient as a matter of law to satisfy the pecuniary-gain aggravator.

To be sure, the death itself need not always be intentional for the aggravator to apply; there have been *robbery* cases in which the aggravator was found to apply even though the robber did not specifically intend to kill the victim. *See State v. Harding,* 141 Ariz. 492, 500 (1984) (upholding pecuniary gain factor where robbery victim asphyxiated as a result of binding and gagging). But the Arizona Supreme Court has repeatedly held that "'[t]he existence of an economic motive at some point during the events surrounding a murder is ***not*** enough to establish' pecuniary gain as a motive," and that there must be a specific, strong connection between the motive and the killing. *State v. Sansing*, 200 Ariz. at 353–54. Accordingly, in the context of robbery, the law requires that a court "distinguish a murder that occurs during a robbery or burglary in which the expectation of pecuniary gain serves as a catalyst for the entire chain of events, including the murder, from a "robbery gone bad." *Id.*

By all accounts, the events of October 8, 2009 were a sweat lodge ceremony "gone bad." There is no colorable argument Mr. Ray "expected" to profit from the deaths, or that the deaths resulted from Mr. Ray's alleged desire for pecuniary gain. Because the legal grounds for this aggravator are absent, this Court must not submit the aggravator to the jury.

C. Allegation (3): Mr. Ray Committed The Unintentional Crimes of Negligent Homicide With An Accomplice.

The State alleges that Mr. Ray had accomplices in these accidental deaths. *See* A.R.S. §13-701(D)(4). As an initial matter, the State has provided insufficient notice of this allegation. Nothing in the State's charges or anywhere else in the record names the accomplice. The only explanation the State has ever provided occurred in a letter to the defense dated June 24, **2010**:

> Members of the defendant's staff, whether paid or volunteers, are accomplices to the events. Their names and identities are set forth in the previously provided reports.

Letter from Sheila Polk to Truc Do, 6/24/10. One full year later, the State *still* has not identified the accomplices by name or provided any explanation of its theory. The allegation should be stricken for that reason alone.

In any event, the aggravator fails as a matter of law in this case. Under the two statutes defining accomplice liability, as interpreted by Arizona case law, a person can be an accomplice only if he (1) intends to aid in the criminal conduct and (2) possesses a culpable mental state. *See generally* A.R.S. §13-301; A.R.S. §13-303(B); *State v. Garnica*, 209 Ariz. 96, 101 (App. 2004) (approving Model Penal Code commentary that the accomplice must have a "conscious objective [of] bringing about . . . *conduct* that the Code has declared to be criminal") (alterations in original) (quoting Model Penal Code §2.06(3) cmt. at 310)). Although recent decisions of first impression have held that a person can be an accomplice to unintentional crimes, a person cannot be an accomplice without meeting these two requirements.

Thus, in *Garnica*, a case involving reckless endangerment, the accomplice-defendant "gave his brother an additional clip of ammunition in the heat of battle, after the first clip had been spent, under circumstances in which it was clear that [his brother] would keep shooting." The defendant clearly met both requirements noted above: (1) "he clearly intended to 'further"

and 'aid' his brother's conduct in discharging the weapon into the group of people"; and (2) he "was also, at the least, reckless about whether that conduct created a 'substantial risk of imminent death,'" as required for the endangerment charge. *Id.* at 101-02. Similarly, in *State v. Nelson*, 214 Ariz. 196, 199 (App. 2007), a negligent homicide case, the defendant and another man brutally beat a man to death outside of a party. Although the doctors were unable to determine which man's blows caused the death, the Court determined that the defendant, Nelson, could be found guilty even if the other man's punches had caused the death. This was true because Nelson had (1) acted in a criminally negligent manner; and (2) "acted with intent to promote or facilitate [the other man's] participation in the beating" of the decedent. *Id.* at 199.

Here, in contrast, both requirements are lacking. First, the Defense is aware of no allegation by the State that members of the Dream Team or JRI Staff—many of whom have been witnesses in this case—themselves acted in a criminally negligent manner—*viz.*, that they failed to perceive a substantial and unjustifiable risk that the three deaths would result, where their failure was a gross deviation from reasonable conduct. Nor has the State alleged, much less substantiated, that any of the Dream Team or staff members *intended* to aid in criminal conduct. It is not enough for the State to allege that volunteers and staff intended to aid in the sweat lodge ceremony, for that is not a crime. To the extent that Mr. Ray's criminal conduct was failing to stop the ceremony—the theory the State pressed vigorously in its closing argument—the State would need to show that the alleged accomplices intended to assist Mr. Ray in failing to stop the ceremony in spite of the substantial and unjustifiable risk of death. No evidence supports that argument. The aggravator cannot go to the jury.

D. Allegation (4): Mr. Ray "Was In A Unique Position Of Trust" With The Decedents.

The State has also alleged the catch-all aggravating circumstance: "Any other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime." A.R.S. §13-701(D)(24). Specifically, the State alleges that Mr. Ray "was in a unique position of trust" vis-à-vis those who participated in the sweat lodge ceremony. Pursuant to the Due Process Clause and recent Arizona case law, the catch-all factor

cannot serve as a basis for an aggravated sentence, and thus this allegation should not be tried before the jury over Mr. Ray's objection. In any event, this allegation in unsupported by any evidence the State could adduce. The abuse-of-trust aggravator has never been applied in Arizona outside the context of sexual abuse, and Mr. Ray did not abuse a position of trust in order to commit the crime.

1. The "Catch-all" Factor Cannot Serve As a Basis For Increasing A Defendant's Maximum Punishment, and Should Not Be Tried Before the Jury

The Arizona Supreme Court has held that, because the "catch-all" aggravator is "patently vague," its use "as the sole factor to increase a defendant's statutory maximum sentence violates due process." *State v. Schmidt*, 220 Ariz. 563, 566 (2009). Thus, in order to impose a "maximum term" within the meaning of A.R.S. §13-701(C), the jury must find beyond a reasonable doubt one aggravator *other* than the catch-all aggravator. *Id.* Similarly, in order for the Court to impose an "aggravated term" within the meaning of A.R.S. §13-702(C), the jury must find beyond a reasonable doubt *two* aggravators other than the catch-all aggravator. *State v. Perrin*, 222 Ariz. 375, 378 (App. 2009). Under these decisions, the State's allegation under the catch-all provision of §13-702(C)(24) that Mr. Ray abused a position of "unique trust" cannot serve as the basis for increasing Mr. Ray's sentence above the presumptive term.[3] The aggravator is thus not one that must be tried before the jury for purposes of *Blakeley* and the Sixth Amendment.

Accordingly, there also is no legal basis for forcing Mr. Ray to submit to a jury trial on this aggravator over his objection. The statutory provision that requires both the State and the defendant to waive the right to a jury trial applies by its terms only to those aggravators that can serve as the basis for a maximum or aggravated sentence and thus are required to be found by the jury. *See* A.R.S. §13-701(C) ("The minimum or maximum term . . . may be imposed only if one

[3] Under Arizona law, "the statutory maximum sentence for *Apprendi* purposes in a case in which no aggravating factors have been proved . . . is the presumptive sentence established" by statute. *State v. Martinez,* 210 Ariz. 578, 583 (2005). "An aggravating factor that subjects a defendant to an increased statutory maximum penalty is thus the functional equivalent of an element of an aggravated offense." *Schmidt*, 220 Ariz. at 565-66.

or more of the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt"; (F) ("trier of fact" means the jury unless both parties waive); *id.* §13-701(C), (F). Similarly, the Rule of Criminal Procedure providing for jury trial of aggravating factors applies only to those sentencing allegations *required* to be found by the jury. *See* Ariz. R. Crim. P. 19.1(b)(2) ("If the verdict is guilty, the issue of the non-capital sentencing allegation *required to be found by the jury* shall then be tried, unless the defendant has admitted to the allegation.). Allegations under the catch-all provision, as noted above, cannot raise a defendant's maximum sentence and thus are not required to be found by the jury.

2. No "Abuse of Trust" Existed in This Case

In any event, no abuse of trust sufficient for aggravation existed in this case. First, no Arizona law supports the State's novel position that a "unique position of trust" can give rise to an aggravated sentence under the catch-all factor outside the context of sexual exploitation or abuse. *Cf. State v. Long*, 207 Ariz. 140, 143 (App. 2004) (defendant, the long-time, live-in boyfriend of the mother of the 14-year-old victim, had a "quasi-parental" relationship with the victim and "demanded that she engage in sex with him or 'he would kill [her] mom and the people closest to [her].'").

Second, even if such an abuse-of-trust aggravator were legally cognizable, the undisputed facts in this case show that it would not be satisfied here. Under the sparse Arizona authority on this issue (related to sexual abuse) and under a comparable federal sentencing Guideline,[4] a sentence is properly aggravated based on an abuse of trust only if the position of trust "contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult)." *Id.* § 3B1.3 n.1. In addition, the essence of the aggravator is that the defendant exploited the trust for his own gain. *See, e.g., United States v. Haines*, 32 F.3d 290,

[4] Although no Arizona law sets forth the boundaries of this aggravator, useful guidance may be gleaned from the Federal Sentencing Guidelines, which provide a sentencing enhancement when "the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense"—precisely what the State seeks here. U.S. Sentencing Guidelines Manual § 3B1.3 (2009).

292 (7th Cir. 1994) ("Abuse of a position of trust was demonstrated by the fact that [the defendant] . . . secured a power of attorney from [the victim], *and then used that power for wrongful gain.*" (emphasis added)). The examples presented in the Federal Sentencing Guidelines Manual bear out this requirement: an attorney who embezzles client funds does so to gain financially, a bank executive or investment advisor who masterminds a fraudulent investment scheme does the same, and a doctor who sexually abuses patients does so to satisfy his own lascivious desires. But as discussed above, Mr. Ray had nothing to gain from the death of the sweat lodge participants. To the contrary, he had everything to lose and in fact did lose everything—as the aftermath of the sweat lodge incident has shown. The "unique position of trust" aggravator, like the other three aggravators discussed in this motion, must be stricken.

III. CONCLUSION

Four of the five aggravating circumstances alleged by the State are unsupported by law or evidence. This Court must strike the alleged aggravators that Mr. Ray committed negligent homicide (1) in an "especially heinous, cruel or depraved manner," (2) for pecuniary gain, (3) with an accomplice, and (4) while in a "unique position of trust" with the decedents.

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